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State and Nation in the International Law Tradition: A History of French-German Antagonisms and Possible Responses in the Spanish Late Medieval Tradition

Introduction

One of the most vexed questions in international law is whether peoples or states have priority in the modern system of international law. Sometimes this is posed as a question of the right of peoples to self-determination. The dominant Western view is that the territorial integrity of states has priority, so that a right of self-determination can be exercised only in so far as it is compatible with the other principle. In effect this means it can only be exercised with the consent of states affected by it. Such a conclusion reflects the belief that states have priority over peoples. However, to reduce the issue of peoples' versus states' rights to this particular conflict is to miss the overall significance of the juxtaposing of peoples' and states' rights. It is intended in this study to explore the question in a more concentrated and yet general way by looking to how it is tackled in the doctrine of some of the main textbooks in international law of Germany and France. Textbooks, by their nature, can be expected to consider the implications of concepts systematically. Once differences in approach are established the next stage of the argument will be to draw out analytically their full significance. This will provide a full-blown contemporary context from which one can then proceed to consider the history of the antagonistic espousal of contrary doctrines of state and nation in the two countries. It has to do with the nature and meaning of Law

as such, from which consequences then flow for both constitutional and international law. A final and vital part of the historical argument will be that both traditions should be subsumed under a rubric which rejects both approaches to legal modernity. This will appear reactionary, a return to the late medieval Spanish scholastics. However, it has as a minimum, the negative merit, heuristically, of rendering all the clearer the deficiencies of the French and German approaches.

Contemporary Textbook Approaches to State and Nation/Peoples[1]

Germany

The textbook *Universelles Völkerrecht* (1984 edition) by Alfred Verdross and Bruno Simma is widely regarded as a most authoritative statement of German/Austrian international law doctrine during the time of the Federal Republic of Germany of 1949–1989. It is at present not a dominant textbook in use in German Law Faculties, partially because as a source of reference it is sharply dated. Much greater place is given to two important collective works, *Völkerrecht,* edited by Ipsen, and *Völkerrecht*, edited by Vitzthum.[2] In the text by Verdross and Simma there is a commitment to the distinctively German view of the nature of the nation/Volk and its relationship to the state. This is an ethnic nation, which, at the time, did not enjoy full self-determination because of the partition of the country. The discussion of the relationship between state and nation is distinctive in European terms. Verdross/Simma argue (para. 380) that a state is not simply an association of people for individual goals, but is, once again, a *civitas perfecta* of those belonging to it, which provide the state the primary basis of its authority, a personal rather than a territorial jurisdiction. A population of a state must be a permanent association of people tied together by blood.[3] The state territory is not

[1] This and the next, second section of the present study are a much shortened version of some of the arguments of an article published in the European Journal of International Law 11 (2000), Convergences and Divergences in European International Law Traditions, pp. 713–732. The article formed part of a colloquium about international law textbooks and is mainly concerned about how textbooks can be shaped. It has much more detail on substantive legal approaches, while here the stress is only on a minimum of the theoretical approaches in the texts necessary to understand the place and function of the third part of this study. That article lacked, for reasons of time and of space, as it says in its conclusion, the theoretical elaboration which is presented here. Ideally the two pieces could be read as consecutive parts.

[2] Völkerrecht, 4th edition *Knut Ipsen* editor, 1999, and Völkerrecht, 2nd edition *Wolfgang Graf Vitzthum* editor, 2001. Throughout the paper account will be taken of the positions presented in these works, bearing in mind, at the same time both their collective and reference (informational) character.

[3] "… Bei einem Staatsvolk muss es sich um einen dauerhaften Personenverbund handeln, der in der Geschlechterfolge fortlebt …" Different from standard British and French definitions. The authors cite a German court case which refers to the celebrated strong concept of the population as a Schicksalsgemeinschaft (a community of destiny).

simply the spacial dimension of the jurisdiction of the state, but the secured space (den gesicherten Raum) of the People, which has organised itself into a state (para. 380). The root of the authority of the state is the *personality principle* of Germanic law, whereby every member of the tribe (Stamme) is under the authority of the legal order of its community. The authority of the state over everyone on its territory is becoming more important but *it cannot push into the background* (own italics) the personal dimension which is the most important to the state, an association of persons based upon personal loyalty between the state and the nation (Staatsvolk) (para. 389). The authors stress sharply exactly what they are saying. Naturally it would be possible to have a purely territorial view of the drawing of the boundaries of the world, but then there would be no *Heimatstaaten* and no *Staatsangehörige*, both concepts which suppose attachment of particular people to one another and to a place. Without this dimension the state would not be the organisation of a people but an administrative region of a world state.[4]

This concept has profound implication for the detail of principles and rules of international law. A direct consequence is that a change of government does not touch the identity of the state. It is "… in der Geschlechterfolge fortlebende Bevölkerung", which provides the material element of the state, that the continuity of the state is grounded. While Grotius is cited the authors are really thinking of the German situation. They have also in mind the continuity of the German state between 1937 and 1990. This analysis leads into the most difficult subjects of contemporary international law. A discussion of associations without territorial authority (para. 404) focuses especially on movements of national liberation (para. 410). In the case where a Power does not recognise its duty to allow a people which it dominates illegally to go free, this people has the right to realise its freedom through the use of force. This is affirmed in the 1974 General Assembly Resolution on the definition of Aggression (Res. 3314/29). How can one justify this argument in the light of article 2/4 of the Charter? And the objects of the Charter itself? It is a question of an international war and not a civil war as the majority of Western jurists believe. One can no longer suppress a revolt on the part of national liberation groups.

Much later in the manual (para. 509) there is an extensive consideration of the principles of respect and promotion of the right of self-determination of peoples. In terms of a common European history the oppression of one people by another begins with the Dutch and the Spaniards in the early 17th century. Oppression by

[4] It is here that the collective and reference character of the other textbooks present problems. In Ipsen's work the chapter 2, on the state as the normal subject of international law stresses the unity of a state not in terms of language, culture or religion etc, but simply their living together under a common legal system (para. 5). However, the long chapter 6 on peoples (Völker im Völkerrecht) by *Hans-Joachim Heintze* is much closer to the main text, especially para. 27.4.

one people of another leads to the latter insisting on withdrawing from the political community which it constitutes with the former. When India claimed in its ratification of the Covenant of Civil and Political Rights, with respect to Article 1 which refers to the right of self-determination of peoples, that it applied only to people under a foreign jurisdiction and not to countries already independent, the Federal Republic replied formally in August 1980 that the right of self-determination is valid "… für alle Völker und nicht nur für Völker unter Fremdherrschaft …" Any restriction is contrary to the clear expression of the Covenant (para. 510). The central idea is that where a people (Volksgruppe) suffers discrimination, with the result that the people is no longer represented fully, the 1970 Declaration of Friendly Relations Among States applies, that is, there is no longer a government which represents the entire people in an equal manner. Examples are Bangladesh and Northern Ireland. Article 1/4 of the 1977 1st Protocol to the Geneva Conventions of 1949 reaffirms the right of military resistance on the part of discriminated peoples. The only restriction the authors seem to allow in their argument is that it can happen that certain peoples are so small that they will, in any case, only seek autonomy (para. 512). They accept that the United Nations practice opposes what they are saying. Once exercised the right of self-determination is exhausted in the UN view. However, such a perspective ignores the well-known history of how the post-colonial states were constructed in disregard of ethnic distinctions. More fundamentally, the notion of the exhaustion of a right once exercised, has no scientific basis.[5]

France

Combacau and Sur offer a very strong contrast to these German visions.[6] Again the question arises: why this work? The answer has to do with the appropriateness of the book for the general spirit of French foreign policy and the dominant place of the French state in thinking about both law and foreign affairs. Maintaining the grandeur of the French state as a world power is a corner stone of French thinking. This position has two aspects which make it very complex. The primary aim is to

[5] This has remained a virtually standard German position if one considers the whole chapter of *Heintze*, Völker im Völkerrecht (note 4), which is a systematic forty plus pages treatment. While Heintze regards appeal to an external right of self-determination as exceptional, compared to the preservation of the territorial integrity of states, he gives general grounds for the exercise of the right. In contrast in Vitzthum's work (note 2)in the relevant chapter 3, *Kay Hailbronner* in "Der Staat und der Einzelne als Völkerrechtssubjekte" dismisses the legal character of a right to self-determination in less than a page (3.24–25). At the same time he recommends a practical conflict prevention strategy in the face of demands of collective groups. Appropriate autonomy measures can anticipate conflict between a state and its minorities (3.26–29). This approach is grounded in a functionalist assumption that stable state structures should ensure a Law of International Relations which guarantees individual and, where appropriate, minority group rights (3.4–6).

[6] In *Jean Combacau, Serge Sur*, Droit International Public, 1st edition 1993 (the one used here unless otherwise stated). There is now a 4th edition 1999.

assert the independence of the French State (with a capital S) but in France's reduced post-war situation this is best achieved by harnessing a strong European Union to French ends, a fundamental aspect of which includes opposition to American, and, if need be, American-British hegemony. Binding associations are necessary and law, especially treaty law, has a part to play in creating them, but their aim is to augment national strength and profile. By their nature they can claim no universal or absolute normative value. They are competitive and retain their individualistic character even at a collective level. So it is recognised that beyond a European Union which is driven forward under French impetus, international society is dominated by conflicts of interest which can easily become threatening to national security and which are not effectively mediated by international organisations such as the United Nations or the International Court of Justice.[7] The textbook by Combacau and Sur provides a consistent and penetrating analysis of law, the state and international affairs which appears rather close to this vision of France in international society.

In the view of these authors the problem of the self-determination of peoples does not receive prominent or direct treatment. The primary concern is to emphasise the importance, and indeed the priority of the state to the international legal order. In the view of these authors (pp. 28–29) if a state commits itself to a rule it is because it needs a regulated conduct, on the part of others, which it can only have by allowing itself to be regulated. The risk of deregulation is for it a powerful restraint on its emancipating itself from the rules which it consents to have imposed. Reciprocity means that one qualifies one's own act as a response to another act. This thereby follows a logic of subjectivity which underlies the whole system. Because of the lack of hierarchy of norms (p. 28) states recognise that no act can be declared invalid objectively, as each state can literally camp on its own position. It can pretend to its own representation of acts and situations, and this representation remains subjective as far as any third person is concerned.

The definitions of the objective and the subjective which Combacau and Sur use are taken from their understanding of French public law. That is, (p. 19) the objectivity of internal or domestic law rests on the distance of the power of the state from the individuals who are equal before it. A law has been made objectively because it has been made without the consent of the individuals

[7] These perspectives of French foreign policy elites are culled from two volumes: *Marie-Christine Kessler*, La Politique Étrangère de la France, Acteurs et processus, 1999, esp. pp. 153–165; *Maxime Lefebvre*, Le jeu du droit et de la puissance: Précis de relations internationales, 1997, esp. pp. 68, 72, 105, 123–130, 151, 158–160 and 192–205. Both these authors retain close links with the Institut des Sciences Politiques, Paris, the pathway for students, through their examinations, for the École National d'Administration and the Ministry of Foreign Affairs. I have also explored the impact of these themes on French international law doctrine in numerous articles, and, in particular, L'Union européenne à la recherche d'un droit des relations extérieures, in: Union Européene: Intégration et Coopération, edited *Alain Fenet* and *Anne Sinay-Cytermann*, Paris 1995, pp. 245–256.

who are equal before it (pp. 20–22). Hence international law (p. 23) by its very nature ignores the phenomenon of power. The individual interests of states do not (p. 24) represent a public interest. Objective law, that is, constitutional law, does not exist at the international level. That is, there is no equivalent to the state as a guarantor of law, which can designate (determine) the significance of juridical acts or facts (situations).

International law must, if it to be a legal order, create an order of persons with competences which can then modify existing things. Yet, it is still the case (p. 28) that there is no centralisation of (legal) disposition at the international level. Law functions as the notaire who "… constate et officialise, … tout en permettant qu'il en soit tiré certaines consequences …" Indeed, even collective guarantees by states remain an aggregate of subjective individual representations. Combacau and Sur stress (pp. 49–50) that the struggle for law as a collection of positive rules has to be seen as a compromise of interests, animated by a power struggle of perceptions and ideologies. The language of universal values (p. 74) etc. has little influence on the politics of states, closed to their own interests, for whom international law is not so much a system of norms as "… une partie de chasse …"

This entire analysis makes little sense unless one explores further the concept of the state, and hence of law, which underlies it. While both are firmly rooted in a European tradition which is not exclusively French, viz, Hobbesianism, nonetheless Hobbesianism is receiving at present its most explicit, and maybe lucid, exposition among these French authors. In virtually one hundred pages Combacau sets out the implications of his understanding of the state for international law. His starting point is that the history of the state is not a legally justiciable matter. There is an almost mysterious character about the origins of the state. The fact of the state is taken to have come before the theory of the state, in the history of the 16th and 17th century (pp. 265–268). He says of those who have originally founded the state "… ce sont eux qui … ont fait dériver de leur propre idée de l'État des régles légales concernant son mode de formation; leur propre naissance n'est donc pas justiciable …" (p. 265). According to international law the elements which define a state are government, territory or population. However, it is necessary not to confound the conditions for the emergence of the state with the institutions which are proper for the functioning of a state once effectively constituted. This means, effectively, that the elements are necessary to determine whether a state has come into existence, but international law need not concern itself with them afterwards. To confuse the two dimensions of the state just mentioned "… C'est prendre son avoir pour son être …"

It is the actual corporate character of the state which counts. A state as a structure is inconceivable (p. 268) if it does not have a constitution which treats a group of persons as organs of the state. As Combacau says, the apparition of the state is inconceivable if the collectivity does not give itself the organs by means of which the actions of fact of the social body which it, presumably the collectivity,

(les agissements du fait du corps social) constitutes already, can be imputed to the legal corporative body (corps de droit) which it claims to become (p. 268). What is missing from this analysis is a clear statement as to why and in what senses it does not matter to international law how the "corps social" becomes a "corps de droit".

However, the reasoning can be pieced together from other parts of the work by both authors. Sur says of the relation state/nation, the coincidence of the two is a delicate matter. The national composition of a state is a social reality and not a juridical matter. International law attaches to the idea of sovereignty and sees in the state a stable element and foundation. The law prefers the stability of frontiers to their being put in question and it prefers to guarantee the rights of minorities to allowing secession (p. 73). Sovereignty itself signifies a power to command. As Combacau says (p. 226) sovereignty signifies the power to break the resistance as much of one's own subjects as of one's rivals in power. It has to subordinate both. The beginning of the institutions of the state are a matter of fact because, by definition, the state does not pre-exist them – that is, the institutions have not come into being by a constitutional procedure. They may claim a legitimacy from a struggle which the collectivity has lead against a state which it judges oppressive, but international law is indifferent to the internal organisation of collectivities. Nothing requires that organs be representative, but merely that they have power "… de quelques moyens qu'ils aient usé pour le prendre et qu'ils usent pour l'exercer …" (p. 269).[8]

Once so constituted the state appears to exist in an immaterial world. It is said that the state as a corporate body is detached from the elements which compose it. It is this reasoning which allows Combacau to say that the moral personality of the state, in the sense of corporate identity, removes the significance of the identity of the persons and the groups which make it up materially. This has the

[8] This theory of the state, it will be argued in the next section, is, in terms of the history of the theory of the state, early modern, absolutist in character. As it is the lynch-pin of the whole presentation of a French position, in the sense that both an epistemology of law and particular rules on the use of force are seen to follow from it, it is essential to consider whether the views of these authors are unrepresentative of their international law colleagues in France. In Droit International Public by *Nguyen Quoc Dinh*, *Patrick Daillier* and *Alain Pellet*, 6th edition 1999, the authors say that for the definition of the elements of a state, among the terms population, nation and people, only the first is accepted. Disagreement is total on the meaning of the term "nation". The spirit of this analysis is the same as with Combacau and Sur. The effect of a right of secession, vindicating a right of self-determination, would be unlimited territorial claims. Once a state is created it confiscates the rights of peoples (at para. 267, pp. 407–408). In the recent collective volume directed by *Denis Alland*, Droit International Public, Paris 2000, *Hervé Ascensio* provides a very lucid third chapter on the state as a subject of international law. Using virtually identical metaphors to Daillier and Pellet he speaks of the right of self-determination of peoples as a matter which may be exercised at a particular historical instance, after which the people effaces itself once again behind the state (para. 91). He draws a distinction between the sociological and juridical definition of the state, one which Kelsen had tried to overcome, and he prefers the former, which reflects the factual, historical origin of the state, that its coming into existence is not governed by international law (para.s 73–75). The drive for self-determination

consequence that the greater or lesser modification of the spacial basis or the population of this territorial collective which is the state do no more than draw in another manner the contours of the object with respect to which the international competences of the state are recognised (pp. 219–220).

In conclusion, it might be said that, for these authors, it is still possible to speak of the original and primitive liberty of states rather than of an international constitution which bestows legal identity on states and thereby integrates them into a legal community which they do not predate – the position of Verdross/ Simma. Combacau argues that International law consists of the limits on this primitive liberty. The law of the state (le droit étatique) is still unilateral, resting upon an exclusive and discretionary power (p. 226). It is hardly surprising that Combacau can point to and accept the consistent rejection by states of a right to secession as part of the right to self-determination of peoples (p. 262). In the same spirit of "legal subjectivity and relativity", as has already been seen, Sur returns always to his point of departure. The primary concern is whatever is required for the security of the state, in the judgement of that state. So definitions of security are subjective. He believes it useful to say that it is international law which recognises to each state its right to security. Thus the state remains free to decide what this requires. The UN Charter cannot exclude individual traditions of security (pp. 620–621).

The State and the Nation – A Preliminary Philosophical Analysis of their Significance

When the question is posed how far is it possible to look to a convergence of such divergent positions it will be necessary, at this stage, to attempt to idealize the texts in the sense that one returns them to their historical roots to see, in pragmatic terms, what difficulties they are attempting to face and, hence, whether there might be other ways of confronting such difficulties. This means a creative challenging of the assumptions of at least one if not both of the approaches. On the face of it, it may appear that the French and German approaches start from

may be one fact contributing to the appearance of new states. In his Droit International Public, 4th edition, *Pierre-Marie Dupuy* gives extensive attention to the relationship between the classical definition of the state and the right of self-determination of peoples, saying that the problem is difficult because the latter is accepted as legal and as applying in all situations, if one follows the letter and the logic of the international legal texts (para. 133). He looks to international recognition as a solution, with the qualification that there are not clearly objective criteria to identify what is a people. While international law is no longer indifferent to issues of legitimacy and human rights, it will still be a question whether the traditional elements of the state, which express effectivity, are reunited in a particular case, (para. 30–34, 130–132). *Dominique Carreau's* Droit International, 5th edition, Paris 1997, treats the state in the juridical (Kelsen sense) as a sphere of jurisdictional competence accorded by an international legal order and does not look any further into any of the issues examined here.

different premises and are not reconcilable. The heuristic device which will be used to develop this argument will be to present the critical explanations of Hobbesianism by Agnes Lejbowicz in her *Philosophie du Droit International*[9] and, for Germany, to present Karl Döhring's views of the right of self-determination of peoples in his *Völkerrecht.*[10] While the latter text, written by an international lawyer, takes the format of a manual and the former is written by a philosopher, both provide "free ranging" and stimulating play with the implications of their relative national perspectives.

France

Both the roots and the implications of the French perspective need to be understood. Combacau appears to say (p. 265) that the fundamental feature of the development of the state can be traced to the 18th and 19th century when it came to be accepted that the state was a moral person in the sense of a corporate entity somehow separate in every way, i. e. from those who govern and those who are governed and indeed from the territory governed.[11] This formal, immaterialist concept of the state represents well how the Combacau/Sur manual understands the state as a moral person, i. e. a corporate body, somehow as a company might be defined under national legislation. Obviously shareholders, managers and assets can change, probably infinitely, without affecting the identity of the company. Legal significance is determined by legally valid acts of the state, which is completely independent of the identity of its members. The primary difficulty with this approach is what it conceals. Law can only be a matter of what states agree in dealing directly with one another. Yet conflicts in contemporary international society are recognised, or considered, by Combacau and Sur, to come with great frequency from the Hobbesian nature of international society.[12] Order exists only within states. Hence objective legal meaning can only be that defined by the state in relation to its own citizens. In the anarchy of relations with other states all is subjective. This is the theoretical French position which

[9] *Agnès Lejbowicz,* Philosophie du Droit International, Paris: Presses Universitaires de France 1999.

[10] *Karl Döhring*, Völkerrecht, Heidelberg: C. F. Müller 1998.

[11] An argument which has been developed by his student *E. Jouannet* in her doctoral thesis: L'Emergence doctrinale du droit international classique, Emer de Vattel et l'école du droit de la nature et des gens (1993).

[12] Jouannet provides an interesting link between the corporate nature of the state and the shaping of rules by states in their relations with one another as corporate bodies. She attributes this development to Vattel. The difficulty is that Vattel is a follower of Locke and did not have a "realist" view of international society. For reasons of space it is not possible to discuss here more fully Jouannet's views, and, anyway, there is no spirit of Locke in Combacau/Sur. However, the criticisms made here of their approach do not have the same force as applied to Vattel. For another history of Vattel tracing Locke's influence see *Francis Ruddy*, The Origins of the Ideas of Vattel, Cambridge PhD 1969.

Lejbowicz identifies as Hobbesian, quite simply in the sense that, as she puts it, in its relations with its own citizens, the state functions as a corporate entity, a moral person, while in its relations with others it ceases to have this character and becomes simply an individual facing other individuals in a state of nature.

Lejbowicz analyses the French position graphically.[13] The state which passes the frontier of its internal, i. e. national law thereby de-juridicizes its fictive construction so as to make itself once again a natural person. The sovereign remains sovereign, not by virtue of any law, but by virtue of the power that it imposes on other states. At the international level the state ceases to be a fictive person, i. e. it ceases to represent, it simply is. Its proper aim is to preserve its being and to increase its power, a power which it exercises with violence, deception, economic wealth, no matter how. Lejbowicz insists particularly on the absence of a contract for international society.[14] That states are, as it were, placed equal to one another means that they are transformed from public persons inside their frontier to private persons at the level of international civil society, where the Hobbesian struggles prevail. This is precisely why Lejbowicz's calls for a reversal of Hobbes's decision to dispense with classical, i. e. medieval, natural law. Standards are needed which cross state frontiers and stress a natural state of fraternity, inspired by a return to a recognition of the other as the same, where all persons are accepted as having a common nature, and where inequality and difference promote sentiments of affection, rather than fear and the desire to coerce.[15]

The second crucially Hobbesian aspect of the French theory of the corporate body of the state is that, following again Lejbowicz,[16] it removes the distinction between the representative and the represented, so as to make it appear that they are unified. The mask of the state makes disappear the multiplicity of persons who have rendered possible the artifice of the state. The wills of all its members form only one will in the sense that the state can be considered to have only one head. Not one citizen nor even all the citizens together can be taken to be the body of the state. It is Hobbes who makes his own the geometric representation of political space, a representation defined "… par le partes extra partes de la géometrie cartésienne …"

This is precisely how Combacau defines the state as an institution. He offers also a Hobbesian picture of the relationship of state power *with its own citizens.* The response of Combacau and Sur to claims of ethnic or other minorities to secession from their oppressors can only be to deny and reject them. Legal definition, in the sense of meaning and obligation, can only come from the state and the state has to have an overwhelming capacity to suppress. It is only other

[13] *Lejbowicz* (note 9) at p. 143 et seq.
[14] *Lejbowicz* (note 9) at p. 405 et seq.
[15] This theme will be pursued further in the final section.
[16] *Lejbowicz* (note 9), p. 141 et seq.

states which can and sometimes do limit this power, but they will do so driven by a logic which is essentially similar.

Germany

Döhring offers a rigorous logic to his defence of the right to self-determination of peoples as a human right. It is possible for a majority within a state to coerce into submission a minority, as a matter of empirical fact. However, this power brings with it no compelling authority. There is no force in the argument that every life in common requires acceptance of rules because this leaves open the question whether any particular life in common is necessary. That is, the presence of two ethnic groups in one state does not have to persist. Contemporary revolutions and wars show that continuing to live in peace together is not always desired. The people of a state (Staatsvolk) does not have to be homogeneous, but if it is not the state must be able to postulate values which can hold together the cultural differences of its peoples and those states which are not able to, will not endure (nicht überlebensfähig).[17]

The starting point of this analysis is that the greatest threat to security of a state is from within, not from other states. The greatest cause of this threat is the unrepresentative, coercive state which oppresses its large ethnic minorities. Döhring treats the United Nations, a framework of collective security, as largely irrelevant to the types of problems caused by internal repression of one ethnic group by another. Döhring defines ethnic groups as distinguished by language, religion, race and culture and as situating themselves on a distinct territory. Döhring, just as Verdross/Simma, has already defined the population element of a state as a "Schicksalsgemeinschaft" and he treats the right of self-determination of peoples as a fundamental principle of ius cogens. Since the people are the essential substrate of a state, it is not surprising that it can survive the collapse of the state, i. e. the Somalis and Somalia. The right of self determination of peoples is not confined to the colonial world and it is clear both that a right must bring with it the means to defend it – or it is not a right- and that collective self-defence must mean the right of another to come to one's assistance, whether it is an individual or group right that is violated.[18]

If one comes back to Döhring's starting point, he has placed the active obligation on a multinational state to ensure a value framework to bridge cultural difference. He recognizes the dangers of his approach in considering the defensive right of self-determination in the context of the definition of aggression. In 1974 the relevant UN resolution makes an exception to the illegality of the use of force which effectively exempts the typical conflicts of the time.[19]

[17] *Döhring* (note 10), at pp. 3–4
[18] *Döhring* (note 10), pp. 28–29, 71–73, 197–198, 242–246, 330–337.
[19] *Döhring* (note 10), pp. 240–242.

Equally a state which suffers a revolt by a minority claiming a right to self-determination will resist its dissolution by making the same claim. There will be a collision of norms as in constitutional law and the principle of *ius cogens* will give no direction.[20] Nonetheless, for Döhring the starting point remains that the empirical coercive power of the majority within an existing state is merely that. The democratic aspect of self-determination means that, in Döhring's view, the state has a duty to give a minority the institutional possibility to express itself, in order to be able to determine the will of the minority group.[21]

Comparative Historical Perspectives

One cannot escape from ethnic conflict and violence into the illusion that the fiat of the state, as a matter of legal epistemology, can resolve such conflict. As Bartelson has brilliantly explained,[22] Hobbesian, statist thinking has its roots in a Renaissance politics of conspiracy and espionage of sovereign Princes. States, in this model, do not approach one another as comparable institutions retaining their character as moral persons, in the municipal law sense. Bartelson explains how the modern state, born of the wars of religion, wants to forget the birth which has traumatised it. This is the real meaning of the desire of Combacau to argue that one need not look to a theoretical origin of the state because its concrete foundation preceeded the emergence of the concept of the state, the birth of which remains non-justiciable (p. 265). The state has become, as a subject of French public law, the subject of the distinction made by Descartes between the immaterial subject and the material reality which it observes and analyses. In this scheme knowledge supposes a subject and the subject is the Hobbesian state which names but is not named, observes but is not observed, a mystery for whom all has to be transparent. It is the first problem of this theory of knowledge to find security, which lies, for it, in a one way rational control and analysis of others by itself.

In other words the violent Hobbesian state of nature is self-justifying, made inevitable by its own theory of knowledge. There is no place for a reflexive knowledge of self, save for an analysis of the extension (spacial) of the power of the sovereign, i. e. geopolitically, until the frontier. Other sovereigns are not unknown in an anthropological sense, but they are enemies with interests in contradiction, whose behaviour has to be measured and calculated. The mutual recognition of sovereigns does not imply the acceptance of an international order in common, but simply a recognition of what is similar but territorially separated, an according of reputation and a limited security.

[20] *Döhring* (note 10), p. 324.
[21] *Döhring* (note 10), p. 335.
[22] *Jens Bartelson*, A Geneology of Sovereignty, Cambridge 1996.

Lejbowicz tries to deconstruct and reconstruct this French Hobbesian perspective. The state as such has to be left behind. It is because states confront one another as *facts* and not as corporate bodies or *moral persons* that the identities of the persons who compose them are fundamental. So Lejbowicz argues that where these brutes facts confront one another one must return to the natural state of fraternity, which makes it impossible for humanity to be captured by one person alone. The inspiration of the *ius naturale* is that we return to recognise the other as similar, as reflections of the self, images of the self to be found in others because we have a common origin. It is the forces of exclusion which found state particularism, the opposite of mutual comprehension. The enemy is not on the outside but within the self, an evil which each has to rework. State law creates frontiers but without a human space between them. It is the confusion of languages which God has created which ensures an inevitable anthropological distance among peoples and engages them in an perpetual quest for mutual understanding. "L'imaginaire du relationnel se construit avec le iusnaturalisme de la societas amicorum sur le présupposé d'un milieu de communication déjá ouvert …"[23]

Lejbowicz thereby provides a wider context of the Western humanist tradition in which the arguments of Bartelson need not appear so alarming. Bartelson suggests the inevitability of accepting peoples, not states, as a starting point for the definition of international society. Since the revolution of linguistic nationalism, of Herder and Vico, there is no point of return. The exercise of giving a name, of which juridical recognition is only a part, refers directly to language and, with it, to the history of the nation. There are no mysterious powers, detached from society, which can determine a signification by decree, by the employment of words which reflect their monopoly of power and their capacity to coerce. In this sense Döhring is stating the obvious in distinguishing the power from the authority of the majority controlling a state apparatus. Instead of the state it is man who emerges from the subordination to the Prince to become the sovereign of his own representations and of his concepts. The words are not *there*, as they were for Descartes, to represent passively, functioning as a mirror to reflect something external to the subject. It is the activity of the subject itself which creates its own world of experience and which gives itself the words with which to express itself. So language is a reflection of the experience of the individual and of the collectivity to which it belongs. Thus it is language which becomes the subject of interpretation. Language in its dense reality can explain to us the history of the institutions which are rooted in that language. The world of institutions is made by men and thus one can arrive at a comprehension of them *through a knowledge of the self*.[24]

[23] *Lejbowicz* (note 9), at pp. 407–416, quotation at 416.
[24] *Bartelson* (note 22), at pp. 188–201

The Weight of History and its Bearing on the French-German Arguments about State and Nation

Introduction

The memory of the German/Nazi Third Reich is far too powerful for Europeans, at least, to rest comfortably with the idea that the choice between the State and the Nation/People as a basic priority for international law is simply a matter of opinion to which very strong feelings need not be attached. It is believed that the strength of arguments in the German tradition has been compromised generally in European eyes by recent history. However, little is known by international lawyers about exactly how this has happened. The victory of Western liberal democracy over racist Germany has been so overwhelming both militarily and morally that the old cultural arguments between France and Germany have become lost in the mists of time.

It is believed that a remarkable recent study of the Hobbesian foundations of Western liberal humanism, and of the modern, liberal state assists in providing a fresh perspective on the German criticisms of the same tradition. Richard Tuck elaborates a critique which bears comparison with that which has been known to have begun with Herder, to have been aggravated by Fichte and to have culminated with the Nazis. This general impression of history will not be disputed here, except to the extent that Herder has stated no more than an obvious anthropological fact: peoples are separated by language. The advent of democracy as an egalitarian force means that deference from minority languages towards majority ones is not be expected. To this extent Döhring has highlighted a primary problem. Lejbowicz has also indicated a solution for overcoming the anthropological divide. Tuck exposes the dominance of Hobbes in the Western humanist tradition which has shaped international law. The liberal, democratic state is, in its very conception anarchic in its international relations. Herder, Fichte and their later German followers have said as much but offered a disastrous alternative. This short study tries to draw out further the implications of Lejbowicz's recommendation that one go back beyond the modernity of Hobbes to the medieval tradition and classical tradition of humanism which he rejected. This brings one back to the Spanish scholastics, particularly to Vitoria.

A Critique of Hobbes's Place in the European International Law Tradition

It is believed that Hobbes is the crucial figure responsible for interposing the state between individual human beings at the international level. Of course, this is meant only in the sense that he articulates the construction of the modern state as an entity which maintains order within its borders precisely by accepting the absence of order beyond the state. A new interpretation of Hobbes, placing him in the context of the European international law tradition, follows very closely the

sense in which the problematic is understood by Combacau and Sur. The primary source of the conflicts of the state of nature are epistemic in character. It is not that persons are spontaneously aggressive. They are fundamentally self-protective and only secondarily aggressive. It is the differing judgements which people make, which themselves arise from the fact that there is no objective standard of truth, which makes people secondarily aggressive "… it is the fear of an attack by a possible enemy which leads us to perform a pre-emptive strike on him, and not, strictly speaking, the desire to destroy him …"[25] The connection between epistemic moral scepticism and the conventional construction of meaning through the human construction of the state is clear in the following passage from Hobbes' work *On the Citizen,* of which Lejbowicz speaks:

"… This common measure, some say, is right reason: with whom I should consent, if there were any such thing to be found or known *in rerum natura*. But commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is non-existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power …; and consequently the civil laws are to all subjects the measures of their actions, whereby to determine, whether they be right or wrong … (I)t shall not be decided by Aristotle, or the philosophers, whether the same be a man or no, but by the laws." (II. 10.8)[26]

If one sees Hobbes as the culmination of a humanist tradition, in which Gentili is treated as a prime example, the understanding of "humanist" may appear surprising. It refers to the Tacitist, reason of state tradition, with its implication that fear, whether objectively justified or not, was a legitimate basis for aggressive war. In other words there could be no place for the scholastic tradition of the distinction between just and unjust war. The idea of objective criteria for the justification of war was an illusion. This view was expounded first by Gentili, of whom Hobbes was perhaps an actual student (in the sense that he followed his lectures at Oxford). This is to distinguish the rhetorical and sophist humanist tradition beginning with Cicero, from the Aristotelian and Stoic tradition (Seneca), and to put it back in its context through the Renaissance of classical scholarship after the long medieval Christian practice of interpreting Cicero and others as only permitting war in defence of one's innocent and immediate safety.[27]

The anthropology underlying Hobbes's construction is that which is decisive, meaning, quite simply, his vision of man. The weakness of man's sociability is

[25] *Richard Tuck*, The Rights of War and Peace, Political Thought and The International Order from Grotius to Kant, Oxford, 1999, at p. 130.

[26] Cited by *Tuck* (note 25), at pp. 131–132.

[27] *Tuck* (note 25), esp. pp. 138–139 and the whole of chapter one *Humanism*, and esp. p. 22 et seq.; and p. 126 for the possibility that Hobbes heard Gentili's lectures. The connections between Hobbes and the international law tradition represented by Gentili form the heart of Tuck's book.

not simply rooted in fear. The fear itself has to be seen in the context of the fundamental desire of man not for friendship but for glory. In fact, "… every man would seek the company of other men whose society is more prestigious and useful to him than to others. By nature, then, we are not looking for friends but for honour or advantage from them … Even if this is sometimes harmless and inoffensive, it is still evident that what they primarily enjoy is their own glory and not society … Every voluntary encounter is a product either of mutual need or of the pursuit of glory …"[28] This anthropology explains both the roots of subjectivity and the inevitability of violent conflict.

However, as has been seen already in the discussion of the history of sovereignty and of the work of Combacau and Sur, there is an added dimension to Hobbes's work which needs to be made explicit and which is crucial to providing it with its epistemic foundation. The added distinction is crucial because the European tradition which Hobbes was negating, and Gentili as well, was the scholastic tradition based upon Aristotelian-Thomist philosophy. The epistemic centre as the modern state was not, maybe an exclusively Protestant phenomenon, but it was, as already suggested, an outcome of the Reformation and, as Lejbowicz remarks, a break with the medieval tradition.

Hobbes was the most explicit exponent of the thesis that the state had to be *omnipotent* in the making of laws and the final arbiter of any dispute where, *ex hypothesi*, there was no agreement as to how a supposed norm was to apply.[29] The decisive aspect of this exercise of authority is the absorption of all symbols of legality into the state, which includes the unification of the religious and the political. Why Hobbes felt compelled towards this course he makes plain when he says in Part III of *Leviathan (Of A Christian Commonwealth)* that the reason for the right of the sovereign to appoint pastors is that the right of judging what doctrines are fit for peace and to be taught to subjects must rest in the sovereign civil power, whether it be one man or an assembly of men. The reason is obvious: "that mens actions are derived from the opinions they have of the Good, or Evil …"[30]

What may not be fully clear even from these words is the sacralisation of the state which Hobbes deliberately intends. The sovereign must have supreme power in all ecclesiastical matters, where the sovereign is a monarch or an assembly "… for they that are the Representatives of a Christian People, are Representatives of the Church: for a Church, and a Commonwealth of Christian People, are the same thing …" (p. 576) When Hobbes begins his extensive controversy with the Roman Catholic Prelate, Bellarmine, he declares: "… I have

[28] A quotation from *Hobbes*, On the Citizen, I,2 by *Tuck* (note 25), at p. 134.

[29] This follows an argument already presented in *Anthony Carty,* English Constitutional Law from a Postmodernist Perspective, in: Dangerous Supplements, ed. by *Peter Fitzpatrick*, London 1991, at pp. 182–206.

[30] *Thomas Hobbes*, Leviathan*,* ed. *C. B. McPherson*, London 1968, chapter 42, p. 567.

already sufficiently proved that all Governments which men are bound to obey, are simple and Absolute …" Whether the authority is democratic, aristocratic or monarchic does not matter. The essential point is that the power it has be "an Absolute Sovereignty" (pp. 576–577). A crucial feature of the medieval so-called philosophical tradition would be the presence of numerous persons with different interpretations of "reason". Hobbes says that all laws have need of interpretation. Therefore the idea of law must be subordinated to the question of who interprets it. The answer is that the law is binding because it is "the Sovereign's sentence" (pp. 322–323). There is no place for an independent learned class, making doctrines which depend on their learning and not upon the legislative Power (p. 368). In the reading of books, one imagines the exploits of the Greeks and the Romans in overthrowing tyrants, where words such as regicide and tyrannicide are used. People imagine that if they use the right words they can lawfully rebel (p. 369) Again, Hobbes is determined on the sacrilization of state power. The Doctors claim to set up a Ghostly authority against a Civil "… working on mens minds, with words and distinctions, that of themselves signifie nothing, but bewray (by their obscurity) that there walketh (as some think invisibly) another Kingdome, as it were a Kingdom of Fayries, in the dark …" (p. 370). In his discussion of the supposed distinction between temporal and spiritual he sees only anarchy. "… For seeing the Ghostly Power challengeth the Right to declare what is Sinne it challengeth by consequence to declare what is Law, (Sinne being nothing but the transgressor of the Law;) …" (p. 371).

Yet the image of the divinity of the State leaves the European international law tradition with a concept of the State which is incompatible with any overarching binding notion of Law. Hobbes explains why the commonwealth cannot be subject to the civil law (that is to say, what the commonwealth has already commanded). The religious tone of the following expression is clear, remembering that Hobbes has already equated the religious and political commonwealths. This can be seen in the reference to binding and loosening, an analogy with the scriptural authority for ecclesiastical authority and papal infallibility:

"… The Sovereign of a Common-wealth, be it an Assembly, or one Man, is not subject to the Civil Lawes. For having power to make and repeal lawes, he may when he pleaseth, free himself from that subjection, by repealing those Lawes that trouble him …: Nor is it possible for any person to be bound to himself; because he that can bind, can release …" chapter 26, p. 313.

Herder's Critique of the Modern State and its Development through and after Fichte

This is the world in which the individual person is epistemically imprisoned and which (s)he has to overcome if (s)he is to reach out to recognise the other person beyond the frontiers of fear and ambition so lucidly constructed by Hobbes and

deconstructed by Lejbowicz. The most virulent modern European opposition to this paradigm of order has come from Central Europe and from the writings of Johann Gottfried Herder. A primary importance of his work is that it represents a fundamental challenge to the very idea of Europe as a unified tradition.[31] The modern state, as represented, above all, by France, is seen as the successor of the imperial tradition of both Rome and Byzantine Greece. The main feature of this tradition is the dominant, centralising and homogenizing bureaucracy, supported by military force. An indispensable medium of this domination is an imperial language which is the language of command and obedience within the sphere of domination of the imperial power. Latin and Greek may be replaced by French and English, but the purpose of the language which replaces them continues to be the instrument of a dominating elite to ensure conformity within a territory which belongs to it by virtue of conquest. Historically these empires, even from the time of Rome and Byzantium, have not dominated the Germanic and Slav peoples. In the late 18th century the latter are politically relatively impotent and are not regarded as the equal of their Western European neighbours. In this most profound sense Europe is not a political unity.

Herder is the single figure who struggled successfully to undermine this fabric, not to the point of replacing it, but sufficiently to establish that Europe does not have a single state and international law tradition, but at least two, which exist in opposition to each other. That is to say, there is no overarching European tradition which encompasses both the state tradition and the nation tradition which confronts it. The key to subverting imperial order is language. The insistence upon communication within a particular language group in that language alone undermines the imperial administration. The language is the depository of the collective experience of the group to which the imperial administrator does not, and cannot, have, access. The language represents, in addition, a particular form of political community. It is not based upon a structure of command and obedience but upon a community of communication and of understanding. In other words fear, rivalry and a craze for glory are not the dominant characteristics of human interaction. They represent the *ethos* of imperial administrators. The common language of the oppressed subjects of empires expresses the communal life of peasants, artisans, teachers, poets, pastors and all others within the language community who are marked, as human beings, above all, by their

[31] What follows draws heavily on *Pierre Caussat, Dariusz Adamski, Marc Crépon*, La langue source de la nation, Messianismes séculiers en Europe centrale et orientale, Liège (Belgium) 1996, at pp. 5–43, 77–106, 177–182; and *Isaiah Berlin*, Three Critics of the Enlightenment: Vico, Hamann, Herder, Princeton 2000, pp. 168–242. Obviously this analysis is derivative, but in the framework offered here the ambition is no more than to give the non-specialist, i. e. the international lawyer, an impression of the state of the debate about the significance of this person. Further primary research will have to wait another occassion. Later in this study some mention will be made of certain hazardous consequences of this development for international law historiography.

capacity for sympathy in the sense of the capacity to understand one another *as persons*. All knowledge is personal and is expressed through language firstly in its oral form, and only secondarily in the written texts of codes, decrees and archival records of administration.

The ideologically crucial and most threatening features of Herder's message are the instance on the equality of languages, an equality which is expressed by their *incommensurability*. Empires are based upon the supposition that a number of languages, particularly within Europe, English and French, enjoy a justified predominance because they are the expression of the higher culture emanating from the capacity of these empires to express universal values. The universalist categorizes, ranks, allocates, from some supposedly central vantage point. The central strain in Cartesian rationalism regards only what is universal, eternal, governed by rigorously logical relationships as true knowledge. This is only possible through processes of abstraction and categorization which segment and select certain human experiences in *a priori* fashion, thereby losing the whole and undivided man embedded in his culture, conceived as a constant flow of thought, feeling, action and expression. The advantages of these thought processes for imperial administration are outweighed by the fact that the administrators are themselves merely the instruments of one particular culture which remains *incommensurable* in relation to those whom it oppresses.

The political conclusion is the breakup of empires into ethnically based political communities.[32] It is not inconceivable that a socially imaginative and well-informed universal despot, provided he was enlightened enough, could govern each society with a due regard to its individual needs and advance them all towards a final, universal harmony. However, it is difficult to see by what standard this could be achieved, because Herder rejects any overarching standard of values. Since one cannot judge one culture by the standards of another, it has to be accepted that differing cultures will have different growths, pursue different goals and be dominated by different attitudes to life. "… Not a man, not a country, not a people, not a national history, not a State is like another. Hence, the True, the Beautiful, the Good in them are not similar either …" There is a common human essence but the conflicting forms which it takes are unbridgeable. The perfect civilisation in which the ideal human being realizes his full potential is absurd.

The critique of imperial order in terms of linguistic nationalism, has, since Herder's time virtually triumphed in Europe. Not merely Italy and Germany, but Finland, Norway, Greece, Poland, Estonia, Latvia, Lithuania, Bylorussia, the Ukraine, Moldavia, Roumania, Bulgaria, the Czech Republic, Slovakia, Slovenia, Croatia and Hungary all enjoy an exclusively ethnic legitimacy. The remaining imperial powers, France and Britain do not claim ethnic legitimacy but they are monolingual. Portugal and Holland are as well. Spain, Belgium, Serbia and

[32] What follows relies particularly on *Berlin* (note 31), pp. 235–241.

Bosnia remain problematic cases. Only Switzerland is a shining example of multilinguistic community. None of these overwhelming historical developments have been enough to resolve the conflict between the statist paradigm of Combacau/Sur and the ethnic nation paradigm of Döhring.

It will be speculated that, theoretically, the reason for this is the ultimately unconvincing character of both paradigms. The logic of the statist paradigm is that international order can only be assured with the establishment of something equivalent to a world state. Accepting the Hobbesian anthropological vision Kant has come closest to conceiving of a coercive confederation of states, which, as has been seen, is to some extent incorporated into the Charter of the United Nations. Some formalisation of overwhelming coercive force is the only option for the Hobbesian vision.[33] In *The Critique of Pure Reason*, Kant writes "… As Hobbes maintains, the state of nature is a state of injustice and violence, and we have no option save to abandon it and submit ourselves to the constraint of law …"[34] Kant believes that "… individual men, peoples and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* … (For a lawful condition to be established) … it must subject itself to a public lawful external coercion …"[35] The Kosovo intervention of Nato shows both the strengths and weaknesses of the approach. A formal confederation is still impossible, because not all major states can be reined into it.

At the same time Nato has been committed to a statist vision of a multicultural Kosovo, if possible retaining constitutional links with the rump of Yugoslavia. A Greater Albania is a virtually unmentionable proposition, although an independent Kosovo may be seen in some Nato circles as inevitable. Such crises confirm the statist ideology of Nato in its self-confidence. Sur affirms that the state is the pillar of classical international law. " … International law cannot be contemplated without the state, even less so can it be thought of as being against the state …"[36] He notes a recent trend whereby each individual is viewed as a minority in and of himself linked to multiple individual nationalities. This leads to a deep dissocation from the unique tie which identifies a state to its citizens. " … There is a strong risk of it leading to zero loyalty in practice … Who can fail to see that in this way we legitimize and legalize inequality … We would thus turn such a right into a machine for manufacturing, at best, ethnic states or, at worst, ghettos ridden with mafias and sects …" The necessity of the state can be seen

[33] *Tuck* (note 25) develops this as his concluding argument in chapter seven of The Rights of War and Peace, esp. pp. 207–225.

[34] Ibid, quoted by *Tuck* (note 25), p. 213.

[35] *Tuck* (note 25), p. 208, quoting from "The Metaphysics of Morals".

[36] *Serge Sur*, The State between Fragmentation and Globalisation, in: E.J.I.L. (1997), p. 421 at 422.

from the consequences of its collapse. "… We see everywhere, and irremediably, a return to barbarism, with the civil wars which result from this collapse …"[37]

All of this may be a way of saying that the origin of ethnic nationalism in German culture has now to bear the weight of the Third Reich. Herder was not merely not triumphalist with respect to German culture. His praise of Slavonic culture is known to have given birth to slav nationalism.[38] However, Joh. Gottl. Fichte, and his National Socialist (NS) admirer and follower, Gustav Adolf Walz, are another matter. They do give linguistic or ethnic nationalism imperialist tones and Walz, as an accomplished international lawyer, deconstructs what he considers"French" international law in the course of expounding an NS international law doctrine. At this stage the interest is not to expound comprehensively the positions of Fichte and Walz on nationalism and international law. The aim is merely to distinguish them from Herder and to highlight in what respects they also, as Hobbes and his followers, make a return to the *Ius Naturale* difficult but necessary. Nonetheless, a permanent interest of this line of thought is, in all probability, that, when it is compared to Verdross/Simma and Döhring, one has a better impression of the depths of certain traditional German criticism of French thoughts, traces of which remain in these two textbooks.

Fichte published his *Reden an die Deutsche Nation* in Berlin in 1808, i. e. after the total defeat of Prussia by Napoleon the previous year. Whatever the intelligence of this work there is no escaping the frenetic tone of urgency with which it is written. It borrows Herder's theory of language, thought and identity without discomfort.[39] However, Fichte introduces the idea of *Urvolk*[40] which entails the idea of the absolute distinctiveness of each *Volk* and, in particular, the Germans. At a time of conquest by the French, Fichte is anxious to stress how essential it is to struggle against the *foreign*, to strengthen an identity which has still to be made. A fierce opposition is set up between the German and what is derivative and foreign: "… alle diese sind ursprüngliche Menschen, sie sind wenn sie als ein Volk betrachtet werden, ein Urvolk, das Volk schlechtweg, Deutsche. Alle, die sich darein ergeben ein Zweites zu sein, und Abgestammtes … sie sind, als Volk betrachtet, ausserhalb des Urvolkes, und für dasselbe Fremde, und Ausländer."[41]

More dramatic still, Fichte claims that only the German as such is an original and not somehow "put together" person, capable of the love/devotion needed to constitute a Volk. Fichte is drawing on a mystique of the Germans who were not conquered and civilised by the Romans. He contrasts their understanding of

[37] *Sur* (note 36), at p. 426. Presumably the reference to mafia ridden ghettos may be Kosovo or Chechynia.

[38] *Caussat, Adamski, Crépon* (note 31), the key text by Herder is at pp. 180–182.

[39] E. g. in the Vierte Rede, edition of Felix Meiner Verlag 1978, Philosophische Bibliothek, pp. 61–62.

[40] Esp. the Siebente Rede, pp. 106 et seq.

[41] Ibid, p. 121.

community with the State which merely exists to provide individual security of property and peace for the individual. There is a religious significance in the German nation which guarantees eternity through the generations and is worthy of a love onto death.[42] All of this is well-known to refer not merely to the defeat by Napoleon but also to the great influence of French culture in aristocratic circles in Germany, e. g. Voltaire at the Court of Frederick II of Prussia. Fichte is searching for a cultural principle (quite simply a meaning) which will unite all sectors of Germany whatever the class or the region. Language is mentioned and there is no mention of race. However, even the status of language is rather formal in Fichte's system, because he does not consider the German nation already exists. It has to be educated into a political existence, which he sets in opposition to a state which depends upon a coercive apparatus. What is disturbing is that he sets up metaphorical distinctions between "living" and "dead" language, between those who strive endlessly and those who slump into a decaying lethargy and these metaphors are used to distinguish the Germans from the rest of Europe from the time of the Roman Empire, through the Protestant Reformation led by Luther against the Pope, to the stultification of German aristocratic manners through the French.[43]

There is no evidence that 19th century German international lawyers took up Fichte's challenge. However, with the defeat of Germany in 1918 and a Versailles Treaty which was seen in Germany as largely a French imposition, Walz published in 1928, as Habilitation, *Die Staatsidee des Rationalismus und der Romantik und die Staatsphilosophie Fichtes.* Originality, spontaneity and separateness are crucial elements which Walz selects from Fichte. What he calls Self-activity is an original action (ursprüngliche Tat-handlung), whereby the act of freedom is not a copying but a making of the self (Das Denken ist kein Nachmachen … es ist ein Sichmachen).[44] This activity is expressed in purely formal terms, which Walz takes from Fichte's *Wissenschaftslehre*. There is a constant opposition between the active I and the dead Not-I of Being, a contradiction which can only be resolved when one sees the Absolute I as a never-ending striving.[45]

Walz transposes this framework onto the collectivity which he calls the Kulturstaat, now a community of language and blood. Fichte could not understand the necessity of the latter, writing before the Third Reich speaks of a racial unity based upon a blood-community.[46] However, the dynamic of its functioning Walz takes from Fichtean metaphysics. A formal concept of restless activity is presented. So, Walz writes: "… Wer hier nicht vorwärts schreitet, kommt immer

[42] Ibid, Achte Rede, esp. pp. 125, 131

[43] Ibid, Fünfte and Sechste Rede, e. g. at pp. 84–87, 94–97.

[44] *Gustav Walz*, Die Staatsidee des Rationalismus und der Romantik und die Staatsphilosophie Fichtes, Berlin 1928, at p. 459.

[45] *Walz*, Die Staatsidee (note 44), pp. 460–461.

[46] *Walz*, Die Staatsidee (note 44), pp. 536–537.

mehr zurück. Er (Fichte) hat im Staat und seinem endlosen Streben seine eigene glühende Faustische Seele wiedergefunden …"[47] The formalism of these ideas means Walz is not consistent and he criticize Fichte for too narrow a view of how nation and race constitute a culture. European-American culture can effectively draw on foreign talent, as did Napoleonic France.[48] The real focus of Walz's opposition is his understanding of the French state. It combines the traits of absolutist hierarchy and a liberal doctrine of equality which actually functions to homogenize the state's population in accord with the dominant national group through an assimilationist strategy. The real struggle between the I and the Not-I is between this vision of a state and the alternative organic state-community, which can resist because all elements of the community are bound together.[49] However, Walz goes further and claims that an imperialist motive is deeply rooted in Fichte's philosophy. The striving of the I over the Not-I includes the conviction that one's own nation has a sense of itself that it will spread, absorbing others, as it is itself possessed by its own "world-historical idea".[50] Inevitably this vision is disastrous for traditional international legal order. The neighbour is always ready, at whatever opportunity, to increase its strength at one's expense. Possession of territory and the word of the other provide no guarantees of security.[51]

There is some further development of Walz's ideas in his *Völkerrechtsordnung und Nationalsozialismus* published by the NSDAP in Munich in 1942, but mainly with respect to the detail of the theory of the state and of international law. Again, it is the French, under Louis XIV who destroyed the unity of the Reich in the middle of Europe and replaced it with the principle of the sovereign equality of states and the balance of power.[52] This insistence on the sovereignty of the state removes any overarching order such as the idea of the Reich provided, so that the naked power of one such state will prevail over the others. Treaties based exclusively on state interest do not have the authority to provide this overarching order.[53] After 1918 the statist logic has attempted to extend itself through the construction of international organisation, a *civitas maxima* which will be imbued by a modernizing, homogenizing, individualism, treating all people as the same. A universalist legal order deals directly with the individual, removing the connection between Law and community from its racial-social roots and leaving it to float in some normative-logical free space.[54]

[47] *Walz*, Die Staatsidee (note 44), p. 583.
[48] *Walz*, Die Staatsidee (note 44), pp. 599–601.
[49] *Walz*, Die Staatsidee (note 44), pp. 603–605.
[50] *Walz*, Die Staatsidee (note 44), pp. 616–617.
[51] *Walz*, Die Staatsidee (note 44), pp. 617–619, interpreting Fichte's writings on Machiavelli.
[52] *Gustav Walz*, Völkerrechtsordnung und Nationalsozialismus, pp. 5–9.
[53] *Walz*, Völkerrechtsordnung (note 52), pp. 11–15.
[54] *Walz*, Völkerrechtsordnung (note 52), pp. 35–39, 44, 62–67.

Walz sees the contemporary struggle as between French and German ideas. Drawing directly from Fichte and the concept of the *Urvolk* he proposes to resist cosmopolitan, formalist ideas of state sovereignty and equality, with their logical extension to an international organisation – an extension driven by liberal egalitarianism. In simple language Walz's understanding of the ethnic state has to oppose such an order. It is explicitly racist in its formulation and focused on a hostility to foreigners. "Urvolk in diesem Sinne ist die durch Blutsgemeinschaft der Artgleichen bestimmte historische Schicksalsgemeinschaft …" Its task: "Die Absetzung vom Artfremden wird zur elementaren Aufgabe der Selbsterhaltung …"[55] Frontiers are the essence of this world. The struggle between the Urvolk and risk of assimilation requires frontiers and it is this struggle which brings Germans to a sense of their original destiny. "… In den umstrittenen Außenpositionen des deutschen Volkstums entstand das volkische Bewußtsein, das sich gerade gegen die Anspruche des ihm feindlich gesinnten Staates stellen mußte …"[56]

A constitution based on individual liberty has no regulative principle or material community idea. It is exclusively concerned with the allocation of competences and jurisdiction, with the division of powers. This does not point to any principle of national or social cohesion. The democratic state enshrines the idea of the equality of nationalities within it, but this cannot hide the power with which one dominant nation strives to assimilate the others. The principles of freedom and equality transported into central and eastern Europe ignore the fact that one cultural nation will simply dominate and assimilate others. The liberal constitution conceals this cultural assimilationism and it can only be resisted through the state based upon the Urvolk.[57]

The Problematic of a Return to a Pre-modern Ius Naturale

So, with Fichte and Walz Europe is bitterly divided between two notions of state and nation, with their implications for European International Law. Lejbowicz has proposed that we find our way back to the medieval tradition in which humans could recognize and accept one another's similarity. Obviously this is controversial. The other had better not be, runs the dominant view of the Pre-modern, a Jew or a Saracen. In this brief survey of the "state of the debate" the ambition is to understand how much is involved in what she suggests and also what are the most usual forms of the opposition she can expect to meet. The argument is unmistakably anthropological and metaphysical and what is proposed is a summary for further research. However, this author is willing to commit himself to the viability and worthwhileness of the task. It is really a banal

[55] *Walz*, Völkerrechtsordnung (note 52), p. 88.
[56] *Walz*, Völkerrechtsordnung (note 52), p. 89.
[57] *Walz*, Völkerrechtsordnung (note 52), pp. 98–101.

matter of pinning one's flag to the mast of the nature of being of (wo)man in community, also international community.

Tuck has brilliantly argued that modern western liberalism, with its catalogue of human rights and democracy, is a deeply aggressive, predatory racism, responsible for the plundering of the so-called non-western world in a moral vacuum which it itself created. As he puts it himself:

"… (A) liberal attitude to the rules of civil society – that they are constructed by free agents and may be changed by them – is both conceptually and historically associated with international aggression … and the more morally authoritarian views of the early 18th century Germans were associated with (at least in theory) a great mildness in international relations, and a dislike of the freewheeling commercial nations which were carving up the world between them …"[58]

Inevitably such analysis lends credence to the resistance of Herder, Fichte and Walz to the combination of a homogenizing rhetoric of liberal, egalitarianism with coercive state expansion. However, it becomes clear, if one sees Walz as the conclusion of this resistance, that the price of a radical rupture with statist liberalism is the denial of a common humanity with it. This is perfectly understandable given, as Tuck points out, in civic liberalism internal security is purchased at the price of international insecurity. As Tuck puts it "… (M)en who sought to avoid death by creating Leviathan states would find themselves at far greater risk of death than they faced in nature …"[59] In other words civic liberalism is itself the initiator of the division of humanity. This is clearly implicated in Hobbes's doctrine of the religious infallibility of the state which is crucial to the whole early modern absolutist definition of the state, and which remains with us in the French doctrine considered above. The conflict is religious in character and has been confirmed as such by very recent French scholarship. The modern state had, inevitably, to take over the claims to omnipotence of the Papacy in order to resist it and claim autonomy.[60] Walz is correct to have seen the significance of the French defeat of Papacy and Empire (Reich) in the establishment of the post-Westphalia international legal order of sovereign states, although at this stage the struggle with the Papacy and its religious significance is not present in Walz's mind. For him the events of the Thirty Years War meant in fact the destruction of German political unity in favor of French hegemony in Europe.[61] However, a colleague and fellow NSPD member, Carl Schmitt, was

[58] *Tuck*, The Rights of War and Peace (note 25), particularly his treatment of Grotius, Locke and Vattel, as "followers" of Gentili, and his conclusions, pp. 102–108, 173–180, 193–216, quotation at pp. 231–232.

[59] *Tuck*, The Rights of War and Peace (note 25), 230.

[60] See, for instance, *Jean-François Courtine*, Nature et empire de la loi, études suaréziennes, Paris 1999, pp. 9–43, l'héritage scolastique dans la problématique théologique-politique de l'âge classique.

[61] *Walz*, Völkerrechtsordnung (note 52), pp. 10–11.

well aware of the theological dimension of the development of modern state sovereignty.[62]

However, the argument that all meaning, security or whatever, could only be found within the bosom of the Deutsches Volk, the substance of the Herder, Fichte and Walz development for international law, left the same Volk in a war with most of the planet, which it handsomely lost. Schmitt's contribution to this development, his paranoid concept of the friend/enemy distinction, has been discussed in another place by the author. Here, the intention is only to stress the metaphysical implications of Fichte's theory of subjectivity, particularly as developed by Walz, for the agenda set by Lejbowicz. The foundations for existence have to be not merely found, but also created, from within the self alone. There is no place whatsoever for sociability. Instead the radical insecurity which this thesis is admitted by itself to produce can only be resolved itself by a ceaseless push forward to fill the space around oneself, precisely the dynamic of the divine Hobbesian sovereign state.

Courtine offers alternative interpretations of late-medieval European political theology which may help to develop the possibilities of "going back beyond Hobbes". A study of the thought of Thomas Aquinas and Vitoria allows one to see a pattern of thought which firmly separated the metaphysical foundation of political communities, also in relation to one another, from overt Papal authority, itself grounded on problematic interpretations of biblical Revelation, i. e. supposedly revealed divine authority. The significance of this analysis, presented at the end of an article, can be nothing more than analytical. It should be the task of the author to develop it more fully, to the point of an attempted philosophical foundation, in another place.

In the thought of Aquinas the problem of divisions among men, whether through sovereign states or striving nations, cannot arise, because the nature of Law is not to be found in Will or Command, whether of the individual human being, or community, or even of God. Law is a pure expression of reason in the sense that each person has within himself, as also each community, and, indeed, the whole of humanity, quite simply a tendency or inclination towards the fulfilment of his own end, which has an unthreatened place within the whole of Being, including at the apex of Being, God himself, all of which is equally tending, without strife toward the achievement of its own end. For each person it is a matter of becoming conscious of one's own end, and it is crucial, presumably, to have confidence in the positivity of being, that, somehow, the totality of Being will be held together as it tends continuously towards its end. Aquinas considered he was constructing a philosophical system as a follower of Aristotle, but it is difficult not to imagine that such a system was sustained by a faith in divine

[62] *Courtine* (note 60) discusses his "Political theology, Four Chapters on the Doctrine of Sovereignty" in his final chapter, ibid, problèmes théologiquo-politiques, pp. 163–175.

providence. The significant feature of this system for Lejbowicz's challenge is quite simply that Law exists here without any appeal to authority. Community whether national or international is simply a matter of self-conscious education and dialogue.[63]

Vitoria is considered to remain faithful to the substance of Aquinas's theory of law and to apply it to the relations between groups of communities in the context of the so-called discovery of the "New World". The nature of Vitoria's undertaking is hotly contested as will be seen later. However, a sympathetic interpretation is that political communities, in line with Aquinas's thought, are not induced by pathological anxieties, but are a normal form of human association. Hence, the form of these communities neither violates nor exhausts the needs of human sociability. Sociability among political communities is as natural as within them. The particular context of relations between Christian Europeans and non-Christian so-called Indian communities does not give rise to any special imbalance of relations. The former cannot exercise any authority over the latter because of any supposed superior cultural authority. The controversial duty of sociability and communication is understood as reciprocal between Spaniards and Indians and not as authorizing any special right to use force by the Spaniards to justify the assertion of a commercial right of freedom of trade. The duty of sociability is part of the expression of community in which human beings find their own ends, i. e. follow their own inclinations, in one another's society.[64]

This interpretation is supported by a recent study and edition of Vitoria's writings by Pagden. He considers whether there could have been any just cause of war which Vitoria accepted the Spaniards could wage against the Indians. Only sins against nature which constituted an injury against humanity itself could justify war. Comments Pagden: "… And although Vitoria seems never to have ruled out this possibility, he also failed to accept it as a legitimation for the kind of colonial enterprise on which the Castilian crown was engaged …" The crown might have claims under the *ius gentium* if the Indians had injured the Spaniards, but, if, as seems overwhelmingly to have been the case, they had not, Vitoria could only say, as an objective fact, that Spanish withdrawal from America would be an intolerable loss to the royal exchequer. Vitoria had also reminded his audience that there was no evidence the Portugese had gained less by licit trade in Africa than the Castilians had gained in America by illicit occupation.[65]

The concluding note has to recognize and highlight a single issue, about which controversy rages in contemporary debate. It is the question whether an oppressive, ideological interpretation of law is underlying particular ethnic groups's claims for superiority and dominance in international society. Tuck is

[63] *Courtine* (note 60), pp. 47–53 and 118–126.
[64] *Courtine* (note 60), pp. 127–143.
[65] *Vitoria*, Political Writings, edited by *Anthony Pagden* and *Jeremy Lawrance*, Cambridge 1991, p. xxvii.

categorical that such claims do underlie Western state-sponsored liberalism, democracy and human rights. Its record of aggression is born out by its founder-ideologues Gentili, Grotius, Hobbes, Locke and Vattel. Kant offered a remedy as problematic as the disease. A confederation of such liberal states can only be as bad as the states taken individually. Herder, Fichte and Walz were on strong ground in attacking the ideological character of western liberalism, even if they led themselves and the rest of Europe up a *cul de sac*. The question whether Aquinas and Vitoria have more to offer is equally virulently debated. Whatever the author's sympathies, the scholar has to accept that the among Europeans there is no agreement as to the nature or foundations of their international law traditions. This does suggest that debate about the influence of such traditions in the non-European world cannot start from the premise that European traditions are monolithic.